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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN HENRY SELVAGE,

Petitioner,

v.

JAMES A. LYNAUGH,
Director, Texas Department of Corrections

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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ARGUMENT IN REPLY TO RESPONDENT'S BRIEF

I. THERE IS NO LEGITIMATE DISPUTE THAT THE ADEQUACY AND INDEPENDENCE OF TEXAS' PROCEDURAL DEFAULT RULE, THROUGH ITS CHAMBERS EXCEPTION, IS PROPERLY BEFORE THE COURT AND THAT THE APPLICATION OF THE RULE EXCUSES MR. SELVAGE'S DEFAULT

The State of Texas agrees with Mr. Selvage that the Texas courts follow a well-established exception to the state's contemporaneous objection rule -- that "'where a defect of constitutional magnitude has not been established at the time of trial, the failure of counsel to object does not constitute waiver.'" Respondent's Brief at 28, quoting Ex parte Chambers, 688 S.W.2d 483, 486 (Tex. Cr. App. 1984). The State nevertheless maintains that the finding of waiver in Mr. Selvage's case by the state courts, and deferred to by the lower federal courts -- all more than a year before the

announcement of Penry v. Lynaugh, 106 L.Ed.2d 256 (1989) -- continues to control the threshold question of whether an adequate and independent state law ground bars review of Mr. Selvage's Penry claim. Simply stated, Texas' argument must fail because the straightforward exception to the contemporaneous objection rule plainly applies to this case, no independent state law ground otherwise supports the decision below, and the application of this rule has been timely presented by Mr. Selvage.

A. The Chambers rule governs this case

When Mr. Selvage presented his claim that the instructions at his penalty trial prevented the jury from giving mitigating effect to the evidence that he was addicted to heroin and that he was not the killer, he argued that he had been deprived of his Eighth Amendment right to an individualized sentencing

determination. In support of this claim, Mr. Selvage acknowledged that the prior decisions considering similar claims were adverse, but he urged the courts to reconsider these decisions for two reasons: a panel of the United States Court of Appeals for the Fifth Circuit had recently suggested such a denial could offend the Eighth Amendment in certain cases,[1] and this Court was examining the question in Franklin v. Lynaugh, 101 L.Ed.2d 155 (1988). He was unable to cite state court authority to support his claim because the state courts had repeatedly and without exception held that supplemental instructions were not required under the Texas capital statute, regardless of the character of mitigating evidence offered by a capital defendant.[2]

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[1] Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987).

[2] See Brief for Petitioner at 61-66.

Accordingly, Mr. Selvage was unable to argue that any court had firmly and unequivocally accepted his position because none had. The state courts, finding on this state of the law no sufficient reason to excuse the failure to present this claim at trial, held that the claim had been waived due to the absence of objection at trial.

Critically, if this Court's subsequent decision in Penry had then been available, the state courts could not and would not have avoided the merits of the claim. The Texas courts have consistently applied the well-established exception to the contemporaneous objection rule set forth in Ex parte Chambers in situations just like Mr. Selvage's--where this Court has issued a retroactive decision that requires Texas to alter its trial process. The application of this

exception has mandated the belated consideration of previously waived claims raised in the wake of numerous decisions from this Court.[3]

The failure to now embrace the right recognized in Penry within the fold of the Chambers exception would constitute a naked example of capricious enforcement of that rule. Respondent has presented no legitimate reason why the right recognized in Penry would not trigger the Chambers exception. Manifestly, Penry did identify "a defect of constitutional magnitude" that had not been recognized previously by Texas law.

Even though the Chambers rule is a state law rule, it may be applied by this Court in the first instance. This Court has not hesitated to apply state procedural default rules in the first

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[3] See Brief of Petitioner at 37-44.

instance to decide that claims need not be exhausted in the state courts because they would be procedurally barred. See Teague v. Lane, 103 L.Ed.2d 334, 346-48 (1989); Harris v. Reed, 103 L.Ed.2d 308, 320-22 (1989) (O'Connor, J., joined by Rehnquist, C.J., and Scalia, J., concurring). The premise for these decisions is the federal courts' obligation under the exhaustion rule to determine whether a state remedy would be available if an unexhausted claim were remanded to the state courts. Where the claim would be procedurally barred under state law, the Court has recognized that it is inefficient to remand the case to state court.

The same logic applies here, for it is as clear that Texas law would no longer bar Mr. Selvage's Penry claim as it was in Teague that Illinois law would bar Teague's claim. Judicial economy would

accordingly be served and no legitimate state interest would be disserved by this Court's application of the Chambers rule to reach the merits of Mr. Selvage's Penry claim.

B. There is no independent basis for the ruling below

The State also fails to rebut our argument that the proper default analysis is dependent upon, and not independent of, federal law, and makes several arguments we have not made.[4] The Court has plainly held that "when the resolution of the state procedural rule depends on a federal constitutional ruling, the state law prong of the court's holding is not independent of federal law. . . ." Ake v. Oklahoma,

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[4] See Respondent's Brief at 29-35. For example, Respondent claims that Mr. Selvage "argues that, because the state court necessarily considered his Eighth Amendment claim, the state procedural rule is not an 'independent' state ground . . . ." Id. at 29 (emphasis supplied).

470 U.S. 68, 75 (1985).

With the Court's decision in Penry, the question here is whether the analysis under Chambers is dependent upon, or sufficiently entangled with, the federal constitutional ruling. The analysis requires an examination of whether Penry identified a defect with the Texas capital sentencing scheme which the Texas courts had not recognized previously. Surely it did. Prior to Penry, regardless of the character of one's mitigating case, the state courts had concluded that no instructions in addition to the statutory questions would be proper.[5]

For these reasons, and the others set forth in our opening brief, the judgment below does not rest upon an adequate and

[5] See Brief of Petitioner at 61-67.

independent state law ground.[6]

[6] The State argues also that the question of whether there is a valid state law ground is not "fairly included" within the question presented. See Respondent's Brief at 20-23. This argument is meritless. The two-pronged question presented -- does the record show "cause" for the lack of a timely objection, and if not, does it show that a miscarriage of justice will nevertheless result-- presumes that Mr. Selvage failed to comply with a valid procedural rule. In Greer v. Miller, 483 U.S. 756 (1987), the Court granted certiorari to determine what harmless error standard governed a violation of Doyle v. Ohio, 426 U.S. 610 (1976) in habeas proceedings. The Court ultimately decided the case by concluding that the record failed to show a Doyle violation, concluding

> [b]efore reaching the question whether the harmless-error standard applies, we must be satisfied that an error of constitutional dimension occurred. This fundamental question is fairly included in the question presented for review.

483 U.S. at 761 n.3. The question of whether an adequate and independent state ground exists is as fundamental to this case as was the question of whether there

II. BY IGNORING THE DIFFERENCE BETWEEN "PERCEIVED FUTILITY" AND LEGAL FORECLOSURE, THE STATE AND ITS AMICUS CURIAE SEEK TO HAVE THIS COURT PROPOUND A RULE THAT WOULD PROVE SEVERELY DETRIMENTAL TO BOTH STATE COURTS AND CRIMINAL DEFENDANTS.

The State and its Amicus Curiae fail to appreciate the significant differences between the concepts of "perceived futility" and legal foreclosure as they relate to the doctrine of procedural default. At the time of Mr. Selvage's

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was a Doyle violation in Greer.

Even if the Court were inclined, as the State urges, not to reach the question of the validity of the state law ruling in Mr. Selvage's case because it was not raised previously, the Court plainly should make an exception for that part of the validity of the state ground argument which rests on the Chambers rule. That argument was not available until Penry was decided, and by that time, Mr. Selvage's certiorari petition had been pending for fifteen months. Thereafter, Mr. Selvage timely interposed his Chambers argument.

trial, the situation facing his attorney was not one of "perceived futility," as that term was used in Engle v. Isaac, 456 U.S. 107 (1982). In Engle, the Ohio courts had never been given an opportunity to reconsider the settled state practice of placing the burden of proof of self-defense on the defendant, even though a new constitutional theory calling this practice into question had emerged in In Re Winship, 397 U.S. 358 (1970). Thus, this Court held that the "perceived futility" of presenting the Winship claim to the Ohio Courts -- that is, the prediction that they would not accept the claim on the merits -- was not a sufficient cause to justify a failure to present the claim. Rather, the interests of comity dictated that the state courts should have the first opportunity to determine whether developments in federal

constitutional law affected their state practice.

By contrast, before Mr. Selvage was tried the Texas courts had repeatedly and decisively rejected federal constitutional claims of a right to supplemental jury instructions such as this Court later required in Penry. Their rejection was based on Jurek v. Texas, 428 U.S. 262 (1976), and on Lockett v. Ohio, 438 U.S. 536 (1978); and no new constitutional theory had evolved -- or been hinted at-- which the Texas courts had not considered and thoroughly laid to rest. In four separate challenges to the Texas special-issue procedure, the Court of Appeals had held that Jurek and Lockett had sanctioned the constitutionality of the Texas practice. Moreover, the only federal case that had discussed a challenge to Texas' practice also relied upon Jurek and

Lockett in rejecting that challenge. See Granviel v. Estelle, No. CA-4-78-115 (N.D. Tex. Jan. 26, 1979). Selvage's lawyer did not bypass state procedure because he predicted that it would be futile. He simply respected the authoritative rulings of the state courts and forbore to press upon them a claim which those rulings rendered legally frivolous.[7]

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[7] There is no conflict between finding that a pre-Penry claim was foreclosed at the time of Mr. Selvage's trial and finding that, under Teague v. Lane, 103 L.Ed.2d 334 (1989), the supervening Penry decision is not a new rule of law. The kind of foreclosure that confronted Mr. Selvage's attorney was not based upon any explicit holding of this Court. It was based upon what the Court's previous holdings apparently meant in the light of their reasonable interpretation by all the lower courts that had construed them. When this Court subsequently held that the lower courts were wrong, its decision so holding was not a new rule of law for purposes of Teague. However, in view of the lower courts' unanimity regarding the apparent meaning of the Court's earlier cases, defense counsel could not fairly be expected to have anticipated the possibility of such a holding.

In this setting, the Court's recognition that the legal foreclosure of Mr. Selvage's pre-Penry claim at the time of his trial constitutes "cause" for not raising it would not vitiate the doctrine of procedural default, as the State and its Amicus extravagantly assert. It would fully observe the principle of comity because the Texas courts were given abundant opportunity to consider, and they consistently rejected, challenges to the Texas practice such as later prevailed in Penry. It hardly matters, from the standpoint of comity or practicality, whether those challenges were rejected four or forty times prior to Selvage's trial. The result -- that the Texas courts were firmly committed to the view that Jurek and Lockett sanctioned the Texas practice -- was unmistakably the

same.

Thus, the real effect of the State's and its Amicus' arguments on this point is to require that the state courts be persistently dunned with federal claims that they have thoroughly rejected. This would not further comity, but frustrate it. A state court's capacity to participate in the development of federal constitutional law as a partner in the federal system would be impeded if it were forced to hear continually the same federal arguments that it had conclusively rejected. Rather than state courts being eventually persuaded by a continuing stream of claims, as the State argues, the courts would more likely stop paying any serious attention to the claims, since "[le]gal contentions, like the currency, tend to depreciate with over-issue." Jones v. Barnes, 463 U.S. 745, 752

(1983)(quoting Justice Jackson). As a result, when that perfectly pitched case, whose facts "could clarify the gist of the claim," did come across the plate, the state courts would be too numbed to hit upon the latent constitutional violation embedded within the challenged state practice.

And there would be no way for the state courts to convince defense counsel to stop raising such claims, since procedural default would be the price paid for stopping. Cautious counsel would not opt for such a gamble, but would burden state trial and appellate proceedings with every federal claim imaginable that could be premised upon a Supreme Court decision that the state courts had distinguished--or, indeed, as here, had relied upon--in denying relief in past cases. Nor would the state courts be the only losers

if such a practice were required. Defense counsel could no longer exercise professional selectivity in choosing their claims, but would be compelled to file "brief[s] that[,] by rais[ing] every colorable issue[,] run[] the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Jones v. Barnes, 463 U.S. at 753.

It is entirely consistent with Engle to recognize that in situations where a state's courts have repeatedly read prior decisions of this Court as sanctioning a particular state practice and where there is no source of support for a contrary view in other jurisdictions, a responsible lawyer can quit challenging the practice. Under these circumstances, the legal foreclosure of a claim must be regarded as a legitimate ground of "cause" for failing

to raise the claim. Any other holding would be a serious disservice both to the efficiency and integrity of state court proceedings and to criminal defendants with potentially meritorious claims.

III. MR. SELVAGE HAS DEMONSTRATED THAT THE PENRY ERROR IN HIS TRIAL INVOLVES A FUNDAMENTAL MISCARRIAGE OF JUSTICE

A. Penry Error Is A Denial Of Basic Trial Process

The State does not take serious issue with Mr. Selvage's submission that one who is deprived of a component of a basic trial process, can, on that account alone, demonstrate a fundamental miscarriage of justice. Rather, the State argues that Penry error does not arise to the denial of a basic component of a capital trial. The State can advance this argument only by mischaracterizing the sentencing process at Mr. Selvage trial.

The right protected by Penry is the right to an individualized determination of sentence. Under settled Eighth Amendment principles, "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty" -- which in Texas occurs upon conviction of capital murder, see Lowenfield v. Phelps, 98 L.Ed.2d 568, 582 (1988); Zant v. Stephens, 462 U.S. 862, 875-76 n.13 (1983) -- '"the jury's choice between life and death must be individualized." California v. Ramos, 463 U.S. 992, 1008 (1983). The Court has emphasized time and again that this individualized determination is "a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). See also Sumner v. Shuman, 483 U.S. 66, 73-76 (1987). "What

is important ... is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. at 879 (emphasis in original). When Mr. Selvage's jury could not, under the instructions given, consider and give effect to the evidence that he was drawn into crime by his addiction to heroin and that he was not the killer, he was denied an individualized determination of his sentence. See Mills v. Maryland, 100 L.Ed.2d 384, 394 (1988), and cases cited. Thus, he was denied something far more fundamental than access to defensive evidence, see Respondent's Brief at 57, referring to Murray v. Carrier, 477 U.S. 478 (1986): he was denied consideration of the only real issue presented at the sentencing stage of his trial.

The State tries to mask this denial by treating it as the failure to give supplemental sentencing instructions allowing the jury to consider Mr. Selvage's mitigating evidence. It says that Mr. Selvage was to blame for not requesting such an instruction, which, it asserts, was available under state law. See Respondent's Brief, at 57. Since Mr. Selvage had access to a procedure through which he could have claimed his right to individualized sentencing, he cannot complain that the State deprived him of the basic trial process which must be afforded to a capital defendant.

This reasoning, which is strikingly reminiscent of the long-repudiated logic of Frank v. Mangum, 237 U.S. 309 (1915), falls with its premise. For it is sheer fantasy to suggest that if Mr. Selvage had only asked for a supplemental instruction

overriding the limitations of Texas' special-issue formulations, he would have gotten such an instruction or relief from its denial on appeal. Until Penry was announced, the Texas Court of Criminal Appeals had always held that capital defendants were not entitled to such supplemental instructions because they were deemed unnecessary to assure the constitutionally requisite consideration of mitigating evidence. See Petitioner's Brief at 60-65. Thus, even if, as the State says, the Court of Criminal Appeals never ruled that "a trial court's giving of such an instruction [would] be erroneous," Respondent's Brief at 56, no capital defendant could argue to a trial judge that he or she was entitled to the instruction. While the State implies that such instructions were to be had for the asking, it cites no cases in which any

Texas judge actually gave one.

Texas law is absolutely clear that if Mr. Selvage had requested supplemental instructions, he would not have been entitled to them. See, e.g., Quinones v. State, 592 S.W.2d 933 (Tex. Cr. App. 1980). It was Texas law, not Mr. Selvage's own doing, that deprived him of a basic component of the constitutionally required capital trial process.

B. The Standards Proposed By The State For The "Innocence" Determination Are Contrary To The Standard Dictated By Murray v. Carrier

The State, joined by its Amicus Curiae, argues that a capital defendant can establish that he or she is "innocent" of the death penalty, and is thus a victim of a fundamental miscarriage of justice, only if death was an impermissible penalty as a matter of federal or state law. Accordingly, a defendant would be

innocent of the death penalty if he or she: was a non-triggerperson who neither intended to kill nor acted with reckless disregard for human life while participating significantly in a felony murder, see Enmund v. Florida, 458 U.S. 782, 797 (1982); Tison v. Arizona, 481 U.S. 137, 157-58 (1987); is incompetent at the time of execution, Ford v. Wainwright, 477 U.S. 399 (1986); was under 16 at the time of the crime in a state without a legislatively-established minimum age for capital sentencing, Thompson v. Oklahoma, 101 L.Ed.2d 702 (1988); has severe or profound mental retardation, Penry v. Lynaugh, 106 L.Ed.2d 256 (1989); or, in Texas, could not be found beyond a reasonable doubt to have committed the murder deliberately (under special issue one) or to present a threat of future dangerousness (under special

issue two). In the alternative, the State argues that if the Court rejects the preclusion-of-death-as-a-matter-of-law test, a petitioner

> would have to demonstrate the existence at the time of trial of mitigating evidence so compelling that no rational factfinder, properly instructed and viewing all of the reliable evidence in existence at the time of the trial, could have concluded that a death sentence was appropriate.

Respondent's Brief at 52.

Neither of these tests has any support in the prior decisions of the Court. And Murray v. Carrier would have to be overruled in part to accept either of them.

For a habeas petitioner to establish a fundamental miscarriage of justice at the guilt phase, Carrier requires the

petitioner to show only that a "constitutional violation probably has resulted in the conviction of one who is actully innocent...." 477 U.S. at 496 (emphasis supplied). This test does not require the petitioner to show that, absent the constitutional error, the jury could not legally have convicted him or that no rational juror could have found guilt established beyond a reasonable doubt. The Carrier standard is one of probability, not preclusive certainty.

Thus, when Carrier's concept of innocence is utilized in connection with a capital sentencing proceeding, it cannot be limited to cases in which, in the absence of constitutional error, the death penalty could not legally have been imposed or "no rational factfinder ... could have concluded that a death sentence was appropriate," Respondent's Brief at

52. Indeed, in connection with Lockett or Penry error, there can be no such cases. The determination that a capital defendant is death-eligible is necessarily a determination that the death sentence is within the range of sentences that a rational sentencer could impose. See Zant v. Stephens, 462 U.S. at 877 (determination of death-eligibility "reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder"); California v. Ramos, 463 U.S. at 1008 ("[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free ... to determine whether death is the appropriate punishment"). After finding a defendant death-eligible, the sentencer must consider all relevant mitigating

evidence, Eddings v. Oklahoma, 455 U.S. 104 (1982), but it is never required to give any particular weight to the mitigating evidence. Id. at 114-15, 117. Simply put, following a finding of death-eligibility, there can be no state of the evidence which precludes death --- i.e., in which no rational sentencer could choose the death sentence.

C. Had The Jury Been Able To Consider All The Relevant Mitigating Evidence, It Probably Would Not Have Imposed Death

The State argues from the perspective of its proposed preclusion standard that Mr. Selvage has not shown that he is innocent of the death penalty. However, when the evidence is gauged by the Carrier standard -- whether the constitutional error probably produced a death sentence that would not have been imposed without it -- Mr. Selvage has adequately established his innocence of the death

penalty.

In answer to special issue number one, the jury found that Mr. Selvage deliberately participated in the crime which led to the death of Deputy Garza. There was evidence that Mr. Selvage participated in the planning of the robbery and that he actively participated in the robbery. However, there was no evidence that the murder which occurred during the robbery was planned or specifically contemplated. Moreover, there was no evidence that Mr. Selvage committed the murder. To the extent there was any doubt about this, the evidence pointed heavily toward Wilbur Kelly as the killer. To be sure, Mr. Selvage carried a gun, threatened the robbery victims with it, and fired his gun in the course of the gun battle that erupted after Wilbur Kelly shot Deputy

Garza. However, he did not kill or injure anyone. Thus, although he engaged actively in the crime, his personal moral culpability was for robbery and aggravated assault, not for an actual, deliberate murder. Had the jury been permitted to consider the degree of his involvement in the murder as mitigating, it would probably have seen his culpability as calling for life rather than death.[8]

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[8] There is substantial corroboration for this conclusion in the reported data concerning prosecutorial decisions to seek the death penalty and sentencing juries' decisions to impose it. In an analysis of pre-Furman jury sentencing decisions, for example, Baldus, Woodworth, Pulaski, and Kyle reported that the average death sentencing rate for single-victim cases in which the defendant killed the victim was .50 (82 death sentences imposed in 165 cases). Baldus, Woodworth, Pulaski & Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 Stan. L. Rev. 1, 44-46 (1980). In contrast, the death-sentencing rate for cases in which the defendant was not a killer was only .08 (4 death sentences imposed in 52 cases). Id. In

two post-Furman studies of death sentencing rates in Georgia by Baldus and his colleagues, which examined the combined effects of prosecutorial and jury decision-making, the results were quite similar. In cases where the defendant killed the victim in the course of committing a serious offense, the death sentencing rate was .46 (68 death sentences imposed in 147 cases) compared to .15 (19 death sentences imposed in 61 cases) where the defendant was not the killer but was a participant in the contemporaneous offense. Baldus, Pulaski & Woodworth, Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. Crim. L. & Criminology 661, 686-87 (1983). Finally, in a different analysis of the Georgia data, Baldus and his colleagues examined cases in which the murders were classified as "vile" and in which the victim was a stranger to the defendant(s). In these cases in which the killing was deliberate, the death sentencing rate was .81 (59 death sentences imposed in 73 cases) for cases in which the certainty of the deliberateness of the killing was "medium" and .88 (7 death sentences imposed in 8 cases) where the certainty was "high." By contrast, where the certainty of deliberateness of the killing was "low"--a category which included accomplices who did not kill -- the death sentencing rate was only .29 (6 death sentences imposed in 21 cases). Baldus, Woodworth & Pulaski, Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia, 18 U.C. Davis L. Rev. 1375, 1395

In answer to special issue number two, the jury found that Mr. Selvage presented the possibility of future dangerousness. Mr. Selvage had been convicted of two previous crimes and had attempted to escape from a New Orleans jail. Just four days before the Ventura's robbery, he had participated in another robbery with Wilbur Kelly, during the course of which Kelly had also killed someone. Further, Selvage was an addict, driven by his addiction toward crime and so afflicted by drugs and an underlying mental illness that he could not pull himself out of the criminal activity into which he had fallen. There was plainly a possibility of future dangerousness.

However, the aggravating weight of future dangerousness was offset by two mitigating factors. First, Mr. Selvage's

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(1985).

ability to make considered, reality-based judgments during the course of the crimes was very seriously impaired by mental illness and drug consumption. As a result of his disabilities, he was extremely paranoid: he often misperceived simple gestures as threats and reacted self-protectively and violently. His future dangerousness was thus not driven so much by meanness of spirit as by physical and mental impairment.[9] Second, Mr. Selvage's disabilities were and are potentially responsive to therapeutic intervention. Thus, the conditions which concededly made him a future danger could be alleviated or at least diminished. For these reasons,

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[9] The State takes issue with some of the evidence proffered by Mr. Selvage concerning the severity of his mental illness at or near the time of the crime. If the resolution of this dispute becomes material to the Court's ruling, the dispute should be resolved by a remand for appropriate factfinding proceedings in the district court.

Mr. Selvage's jury, if permitted to do so, probably would have tempered its finding of possible future dangerousness, recognized the less culpability he bore for his criminal behavior, and struck the balance in favor of a life sentence.

Respectfully submitted,

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